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In the Supreme Court of the United States

October Term, 1979
No. 79-1257

JAMES F. SEXTON,
Petitioner,

vs.

THE CLEVELAND ATHLETIC CLUB, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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The respondent respectfully prays that the petition for writ of certiorari to the Supreme Court of Ohio be denied.

OPINIONS BELOW

The petitioner has set forth the final order of the trial Court and the opinion of the Court of Appeals together with the orders of the Ohio Supreme Court denying the appeal either as a matter of right or on the basis of the Motion to Certify.

JURISDICTION

The petitioner claims jurisdiction under authority of 28 U.S.C. 1257(3). The petitioner does not question the validity of any statute of the State of Ohio or claim that any law of Ohio is repugnant to the Constitution of the United States but rather claims that the constitutional right protected under Article XIV, Section 1 of the United States Constitution has been abridged. The factual matters set forth in the petitioner's motion do not substantiate any deprivation of a right or privilege under the Constitution.

QUESTION PRESENTED

1. The petitioner contends that the judicial officers of the State of Ohio have deprived him of equal protection and due process. The opinions attached to petitioner's memorandum establish that the judicial officers of the State of Ohio at all times followed the statutory and constitutional provisions of the State of Ohio and of the United States.

2. The judicial officers of the State of Ohio are claimed to have undermined the jury system by denying the petitioner access to the state courts. This undermining of the jury system was allegedly done through the granting of a Motion for Summary Judgment. Based on the materials submitted to the trial Court the motion was properly granted.

STATEMENT OF THE CASE

At no time was the petitioner denied a jury trial contrary to Article I, Section 5 of the Constitution of the State of Ohio. The trial Court did grant a Motion for Summary Judgment which was based on voluminous depositions taken by the petitioner of every witness who had knowledge concerning the alleged libel. The trial Court determined that there was no question of fact to prevent the granting of the Summary Judgment and that the petitioner was not entitled to recover. This decision was affirmed by the Court of Appeals, and the Supreme Court of Ohio refused to hear the case.

Early in the pendency of the action the original trial judge did not proceed to trial on the date scheduled because he was in the process of hearing a criminal matter. This led the petitioner to file an Affidavit of Prejudice. When the Affidavit of Prejudice was filed the trial judge immediately disqualified himself and the matter was reassigned, which is the proper procedure under Ohio law. The later document which purported to be an Affidavit of Prejudice was filed directed to any Judge assigned to the case. This does not constitute a valid Affidavit of Prejudice under Ohio law as was determined by the Ohio courts.

REASONS FOR DENYING THE WRIT

I. WHEN A TRIAL COURT AGAINST WHOM AN AFFIDAVIT OF PREJUDICE IS DIRECTED DISQUALIFIES HIMSELF AND THE MATTER IS SUBSEQUENTLY ASSIGNED TO ANOTHER JUDGE THERE IS NO PREJUDICE TO THE PARTY FILING THE AFFIDAVIT OF PREJUDICE.

In this case the petitioner sought to prevent the original trial judge from hearing the case. This was accomplished when the trial judge disqualified himself immediately upon receipt of the Affidavit of Prejudice. There can be no prejudice to the petitioner in that he has accomplished his purpose sought by the filing of the Affidavit of Prejudice. It is recognized in Ohio that a trial court may disqualify himself from the further hearing of the case after an Affidavit of Prejudice has been filed. *Cuyahoga County Board of Mental Retardation v. Association of Cuyahoga County Teachers* (1975), 47 Ohio App. 2d 28, 351 N.E.2d 77. Subsequent to the disqualification of the first trial judge the petitioner participated in a number of hearings before other judges prior to the time of filing the document which was not directed at any one judge, nor did it state any reason relative to a particular judge, but rather claimed to disqualify the entire trial bench of Cuyahoga County. The petitioner thereafter, entered into discovery, based on orders issued by these judges. The petitioner should not now be heard to complain relative to activities that he himself participated in and acquiesced in.

II. A GRANTING OF A MOTION FOR SUMMARY JUDGMENT IS NOT CONTRARY TO THE OHIO AND UNITED STATES CONSTITUTIONS.

The petitioner in essence is requesting this Court to grant Certiorari because a Motion for Summary Judgment was granted against him. The propriety of the granting of the Motion for Summary Judgment is well documented in the opinions appended to petitioner's petition. Summary Judgment is a proper part of the judicial system and does not constitute a deprivation of a constitutional right.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

FREDRIC E. KRAMER
Counsel for Respondents